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Supreme Court, U.S.
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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1998

HERBERT MILLS,
Petitioner.

v.

BRUCE BABBITT, Secretary,
Department of the Interior,

Respondent.

On Petition For A Writ of Certiorari To The
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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23 pp

QUESTION PRESENTED FOR REVIEW

Does 29 CFR Section 1613.221(a) require that a person - and not whoever happens to occupy a position - be "designated to make the decision for the head of the agency" on an equal employment opportunity complaint?

LIST OF PARTIES

There are no parties not named in the caption.

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THE ISSUE PRESENTED BY
THIS CASE IS IMPORTANT
IN THAT IT POTENTIALLY
AFFECTS DOZENS OF FEDERAL
AGENCIES AND HUNDREDS
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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Appendix 1-2) and the memorandum decision of the United States District Court (Appendix 3-9) were not reported.

JURISDICTION

The judgment of the trial court was entered on October 19, 1995. The judgment of the United States Court of Appeals was entered on May 26, 1998.

LAW INVOLVED

29 CFR 1613.221(a) provides that "the head of the agency or designee shall make the decision of the agency on a complaint based on the preponderance of evidence in the complaint file. A person designated to make the decision for the head of the agency shall be one who is fair, impartial and objective."

STATEMENT OF THE FACTS

The United States Court of Appeals for the Ninth Circuit had jurisdiction to decide the appeal from the United States District Court by virtue of 28 U. S. C. Section 1291. The Court of Appeal affirmed "for the reasons stated in the District Court's order, entered on October 23, 1995, granting summary judgment to Babbitt and denying summary judgment to Mills." The question presented for review is discussed in the District Court's opinion as shown at Appendix 12-13.

In the case of petitioner Herbert Mills, an Administrative Law Judge of the Equal Employment Opportunity Commission had issued a recommended decision under 29 CFR 1613.218(i)(3). The purported final agency decision conceded that Mr. Mills had been the victim of race discrimination and reprisal by employees of the Department of the Interior, including Equal Employment Opportunity (EEO) officials, but rejected that portion of the recommended decision which called for the reinstatement of Mr. Mills with back pay.

If the purported final agency decision did not constitute a final agency decision within the meaning of 29 CFR 1613.221 because it was not made by a person duly designated, then the recommended decision of the Administrative Law Judge became "binding on the agency 60 calendar days after the receipt of the complete file and the recommended decision by the agency" (29 CRF 1613.220(d)), and Mr. Mills was entitled to summary judgment in his favor.

ARGUMENT FOR GRANTING WRIT OF CERTIORARI

This issue presented by this case is important in that it potentially affects dozens of federal agencies and hundreds of thousands of federal employees.

29 CFR 1613.221 requires that the head of each federal make the final agency decision on an Equal Employment Opportunity (EEO) complaint unless the head of the agency has "designated" another "person" to make the decision "who is fair, impartial, and objective."

The law does not permit the head of the agency to designate a position - with its occupant thereby empowered to make final agency decisions on EEO complaints. A "position" is not a "person."

Moreover, if a position is designated, the head of the agency cannot know whether the position will always, or ever, be occupied by a person "who is fair, impartial, and objective."

The law vests the important power to make the final agency decision on an EEO complaint in the head of the agency and permits its delegation only to a "person," and only to a person "who is fair, impartial, and objective."

No published opinion was found on the question presented for review; the Court of Appeals below did not issue a published opinion.

CONCLUSION

It is prayed that this Honorable Court grant the petition in order to resolve the important question presented.

Respectfully submitted,

_____

Herbert Mills - Petitioner

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HERBERT MILLS
Plaintiff-Appellant,

v.

BRUCE BABBITT,
Secretary, Department of Interior,
Defendant-Appellee.

No. 95-17224
D.C. No. CV-93-04387-CW

MEMORANDUM*
(Filed May 26, 1998)

Appeal from the United States District Court for the Northern District of California, Claudia Wilken, District Judge, Presiding. Submitted May 14, 1998**

Before: SCHROEDER, TROTT, and FERNANDEZ, Circuit Judges.

Herbert Mills appeals the district court's summary judgment in favor of Interior Secretary Bruce Babbitt, in Mills's action under the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, alleging that he was constructively discharged from his job with the United States Geological Survey. We have jurisdiction under 28 U.S.C. Section 1291.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except

** We review a grant of summary judgment de novo. See Wallis v. J.R.Simplot Co., 26 F.3d 885, 888 (9th Cir. 1994).

We affirm for the reasons stated in the district court's order, entered on October 23, 1995, granting summary judgment to Babbitt and denying summary judgment to Mills.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HERBERT MILLS,
Plaintiff,
v.
BRUCE BABBITT,
Secretary, Department
of the Interior,
Defendant.
)

No. C 93-04387 CW
ORDER GRANTING
DEFENDANT'S
MOTION FOR
SUMMARY
JUDGMENT
(Filed October 19, 1995)

Defendant's motion for summary judgment or, in the alternative, to strike jury demand and Plaintiff's cross motion for summary judgment were heard by this Court on October 13, 1995. Having considered the papers filed by the parties and oral argument on the motion, and good cause appearing, the Court hereby GRANTS Defendant's motion for summary judgment, for the reasons stated below.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiff Herbert Mills was employed by the United States Geological Survey from 1967 until 1988. In 1971 and 1972, Plaintiff received training in EEO counseling and complaint investigation, receiving certificates in each area.

In 1977, Mr. Mills filed a grievance charging delay in his third promotion due to discrimination by the Personnel Office on the basis of his race (Black) and color (Black). In settlement of the grievance, that promotion was made retroactive, with back pay. Later in 1977, Mr. Mills was selected to become Assistant Branch Chief of the newly formed branch of techtonophysics. In that capacity, Mr. Mills was responsible for all matters dealing with personnel of the techtonophysics branch. He served in that capacity through 1984, receiving two additional promotions.

Beginning in the early 1980's, Mr. Mills was repeatedly recommended for a sixth promotion. That promotion was never granted.

On March 25, 1986, Mr. Mills sought E.E.O. counselling (sic) regarding his nonpromotion. On May 13, 1986, he filed two written complaints. The first, concerning his nonpromotion, named the Personnel Office at Headquarters as the discriminating office. The second, alleging harassment, named the local Personnel office as the discriminating office. Mr. Mills' complaint was accepted on the allegations that Mr. Mills was denied a promotion to GS-14 based on racial discrimination and that Mr. Mills was subjected to reprisal for E.E.O. activities as follows:

1. The processing of position descriptions signed by you was delayed after you signed off.
2. Your authority as the contact person and/or supervisor was circumvented.
3. You were required to submit more documentation to support personnel action...than required of others.
4. False information was given to Branch Promotion Panels concerning you.
5. You were not consulted regarding techonophysics management matters.

The complaints were investigated from May through July, 1987, and a report of the investigation issued in August 1987.

Prior to disposition of the complaint, in April, 1988, at the age of 55, Mr. Mills took "early-out retirement" from the Geological Survey. He did not seek E.E.O. counselling (sic) with respect to his decision to retire. Mr. Mills handpicked his successor, Carl Mortensen, a scientist.

Mr. Mills described his decision to retire as follows in the E.E.O.C hearing:

Q. Now, did you reach a point where you gave up and decided to retire from the Geological Survey?
A. Well, I will tell you what happened. I did reach that point. I filed my discrimination complaint, and I thought that if I recovered anything, that was going to be the only way that I was going to get what I felt I had earned and deserved. I let it be known that I was going to retire on my 55th birthday, which was going to be in '88. I also in late '85 started a business on the outside. I hired people and I started my own business.

Declaration of Susan L. Kamlet, Exhibit C, p. 405.

On March 20, 1989, the Chief of the E.E.O. Office proposed a finding of no discrimination on each of Mr. Mills' complaints. Mr. Mills rejected the proposed findings and requested an E.E.O.C. hearing before an Administrative Judge.

A hearing was held on March 12 and 13, 1990. At the hearing, Plaintiff produced a memorandum prepared two months after Plaintiff's retirement by E.E.O. Officer Carl Agers. That memorandum stated that a desk audit was performed on Plaintiff's position prior to his retirement and the position was graded at the GS-12 level. It further stated that Mr. Agers understood that the division was planning to place Mr. Mortensen in the position at the GM-14 level, and he advised that the job would have to be significantly different to support that action.

On April 5, 1990, the Administrative Judge made recommended findings that Mr. Mills had suffered discrimination and retaliation in his nonpromotion but had not suffered any other type of retaliation or harassment. The Administrative Judge further recommended a finding of constructive discharge. She reasoned that Mr. Mills' first complaint made him "a marked man," and the second complaint was the "kiss of death" to his career. She found that this was demonstrated by the decision to downgrade Mr. Mills' position to grade 12, although that decision was never implemented or known to Mr. Mills prior to his retirement.

Carmen Maymi, Director of the Office for Equal Opportunity of the Department of the Interior, issued a final agency decision rejecting the Administrative Judge's finding because no allegation of constructive discharge had been filed or accepted as part of the complaint, and further because she found no evidence in the record to support a finding of constructive discharge.

The timeliness of Director Maymi's decision is a major issue in this action. The decision is dated Friday, June 8, 1990, but was not mailed until Monday, June 11, 1990. Whether the decision was timely depends upon whether the Department of the Interior received the Administrative Judge's proposed decision was received by the Department of the Interior (sic) on April 9, 1990 or on April 10, 1990.

In answer to an interrogatory in this action, Defendant stated that the decision was received on April 10, 1990. That answer was verified by declaration in support of this motion. It is undisputed that the proposed order was date-stamped April 10, 1990. Director Maymi testified at her deposition that the Department of the Interior had a practice of date-stamping mail "at the time when it was received," as it was opened. Her testimony was ambiguous as to whether there was ever variation from this practice. When asked whether the mail would "sometimes come in in the afternoon such that the mail couldn't be processed before 5:00," she responded "No." However, when later asked whether opening mail was ever "put over to the next day," she responded that she did not know. She also could not answer whether incoming mail had ever been stamped with an incorrect date.

Plaintiff contends that the proposed decision was probably received by April 9, 1990. In support of this contention, Plaintiff proffers evidence that a separate piece of mail, sent from San Francisco to the Office of Equal Opportunity in Washington D.C. by certified mail on June 13, 1991, was received four days later, on June 17, 1991. Plaintiff contends that an inference may be drawn that the Administrative Judge's proposed decision was also received within four days.

Mr. Mills appealed the final decision to the Equal Employment Opportunity Commission. That appeal was rejected. Mr. Mills thereupon requested reopening. The request for reopening was granted, and the Commission found error both in the Administrative Judge issuing a finding of constructive discharge without a formal complaint or investigation of that issue, and in review of that finding on the merits. The Commission remanded the allegation of constructive discharge to give Mr. Mills an opportunity to seek EEO counselling (sic), finding that the date of the hearing, March 13, 1990, should be deemed the date of Mr. Mills' first contact with an EEO counselor for purposes of determining the timeliness of the complaint.

Mr. Mills thereupon filed a formal complaint alleging constructive discharge. The complaint was rejected as untimely. On appeal, the decision to dismiss the complaint was affirmed. Mr. Mills thereafter filed this action.

11. LEGAL STANDARD

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, or when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R.Civ.P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Eisenberg v. Insurance Co. of North America, 815 F.2d 1285, 1988-89 (9th Cir. 1987). The moving party bears the burden of showing that there is no material factual dispute. Therefore, the Court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815 F.2d at 1289. The Court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Intel Corp. v. Hartford Accident and Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991).

Material facts which would preclude the entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The substantive law will identify which facts are material. Anderson Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Where the moving party does not hear the burden of proof on an issue at trial, the moving party "may discharge its burden of showing that no genuine issue of material fact remains by demonstrating that 'there is an absence of evidence to support the non-moving party's case.'" DeBaca v. County of San Diego, 794 F.Supp. 990, 995 (S.D.Cal. 1990), aff'd, 5 F.3d 535 (9th Cir. 1993) (quoting Celotex, 477 U.S. at 325). The moving party "is not required to produce evidence showing the absence of a material fact on such issues, nor must the moving party support its motion with evidence negating the non-moving party's claim." NME Hospitals, Inc. 929 F.2d 1404, 1409 (9th Cir. 1991), cert. denied, 112 S.Ct. 617 (1991). If the moving party shows an absence of evidence to support the non-moving party's case, the burden then shifts to the party opposing to produce "specific evidence, through affidavits or admissible discovery material, to show that the dispute exists." Bhan, 929 F.2d 1409.

III. DISCUSSION

A. Timeliness of E.E.O. Decision

Plaintiff moves for summary judgment, and opposes Defendant's motion for summary judgment, on the ground that the Administrative Judge's proposed findings became the final agency decision on June 8m 1990, prior to the mailing of the E.E.O. Director Maymi's decision, pursuant to 29 CFR Section 1613.220(d). That regulation provides that the Administrative Judge's recommended decision "shall become a final decision binding on the agency 60 days after the receipt of the complete complaint file and the recommended decision...unless the agency has already issued

a final decision." This time period specified in that regulation is clarified in 29 CFR Section 1613.240, which provides that with respect to all time periods specified in that regulatory subpart, if "the last day of the period... falls on a Saturday, Sunday, or Federal holiday...the period shall be extended to include the next business day..."

Plaintiff bases his claim that Director Maymi's decision was untimely on his contention that the Administrative Judge's proposed findings were received by the E.E.O. office on April 9, 1990, rather than April 10, 1990. It is clear that Plaintiff cannot prevail on summary judgment on this contention. There is substantial evidence in the record that the proposed findings were received on April 10, 1990, including Defendant's interrogatory answer, now verified, stating that date of receipt, the date stamp on the document itself, and Director Maymi's deposition testimony of the practice of date-stamping mail on the day it is received.

Scrutiny of the record reveals that Plaintiff does not succeed even in raising a triable issue of fact on this issue. Although Director Maymi's deposition testimony is ambiguous on the issue of whether there has ever been variation or error in the practice of date-stamping incoming mail on the day received, there is no evidence of variation or error in this case.

Plaintiff's only proffered evidence is that on one other occasion, the following year, certified mail was delivered from San Francisco to the same office in four days. This is insufficient to support an inference that the Administrative

Judge's proposed decision was received within four days. There is no evidence that the United States Postal Services always takes the same number of days to deliver letters from city to city.

Plaintiff also suggests that the agency has previously claimed that it mailed the decision of Director Maymi on June 8, 1990, and that this supports an inference that the decision must have been mailed on that date to be timely. However, Plaintiff presents no evidence of any such prior inconsistent statement. The record demonstrates that in the appeal and rehearing, the agency took no such position. The Commission found that there was no evidence as to the date of mailing, but found that the decision was timely because it was "highly unlikely" that the decision was mailed after June 11, 1990 given that it was received on June 13, 1990. On rehearing, the Commission affirmed this portion of the decision, applying its usual presumption that a final decision is mailed on the next business day following the signature date.

B. Impartiality of E.E.O. Decision Maker

Plaintiff moves for summary judgment, and oppose Defendant's motion for summary judgment, on the further ground that Director Maymi could not properly review the Administrative Judge's proposed decision under 29 CFR Section 1613.221(a). That regulation provides that "the head of the agency or designee" shall make the final decision on an E.E.O. complaint, and that a person designated by the head of the head must be "fair, impartial and objective."

It is undisputed that the Secretary of the Department of the Interior made a structural delegation of the duty to review proposed decisions of Administrative Judges to issue final decisions of the agency to the Director of the Department's Office for Equal Opportunity. Plaintiff contends that such a structural delegation to a position, regardless of what person holds that position, rather than a delegation to an individual, does not comply with Section 1613.221(a). However, Plaintiff cites no authority for this proposition. Plaintiff also fails to demonstrate any defect in such a structural delegation. The position to which the duty is delegated is charged with ensuring compliance with the agency's equal opportunity obligations, and is thus charged with being fair, impartial and objective. Finally, plaintiff fails to produce any evidence calling Director Maymi's individual impartiality into question.

Plaintiff contends that Ms. Maymi's deposition demonstrates that she was not fair, impartial and objective in that she did not actually make the decision in the case of Mr. Mills, but merely approved the recommendation of her staff. The transcript does not demonstrate any dereliction of Ms. Maymi's obligation to be fair, impartial and objective.

It is true that Ms. Maymi testified on May 23, 1995, that she believes she read the transcript of the E.E.O.C. hearing in 1990. He recollection of the transcript, five years later, was that it was about sixty pages in length, when it was actually 466 pages. In addition, she could recall only one of the six witnesses, she could not recall

the specific evidence with led her to uphold the findings of discrimination, and she could not recall seeing the June 1990 memorandum proffered by Plaintiff at the E.E.O. C. hearing. However, her inability to recall the specifics of one case, five years after reaching her decision, is not probative of any lack of fairness in reaching the decision.

Plaintiff has failed to produce any evidence that Director Maymi was not designated to decide his case, nor that she was other than fair, impartial and objective. Accordingly, this ground neither supports his own motion for summary judgment nor undermines Defendant's motion for summary judgment.

C. Exhaustion of Administrative Remedies

Defendant moves for summary judgment on the ground that Plaintiff's claim of constructive discharge is procedurally barred in that he failed to exhaust his administrative remedies by filing a timely complaint charging constructive discharge. Exhaustion of administrative remedies is a prerequisite to a Title VII action under 42 U.S.C. Section 20003-16(c). Cosgrove v. Bolger, 775 F.2d 1078, 1080 (9th Cir. 1985). However, the administrative deadline to seek counseling within thirty days of the allegedly discriminatory act is not jurisdictional and is subject to equitable extension in appropriate cases. Id., citing Boyd v. United States Postal Service, 752 F.2d 410, 414 (9th Cir. 1985). The Ninth Circuit held in Boyd that the thirty-day time period begins

to run when the facts that would support a charge of discrimination would have been apparent to a similarly situated person with a reasonably prudent regard for his rights. 752 F2d at 414. The period is subject to equitable tolling if the employee is affirmatively misled by an agency official or is unaware of the appropriate procedures. Id.

In the instant case, there is no triable issue of fact whether Plaintiff timely complained of constructive discharge. Constructive discharge requires that an employee feel forced to resign because of intolerably discriminatory working conditions. Watson v. Nationwide Insurance Co., 823 F2d 360, 361 (9th Cir. 1987). For this theory to apply to Plaintiff's apparently voluntary retirement, the discriminatory working conditions must have been so apparent to him that he felt forced by them to retire. He has testified in deposition that this was indeed the case, that he decided to retire based on intolerable working conditions. Therefore, the thirty-day period necessarily began to run no later than the date on which Mr. Mills retired.

Mr. Mills first complained of constructive discharge two years after his retirement. Thus, to avoid a time bar, he must proffer some evidence supporting equitable extension of the limitations period. He has not done so. It is apparent from the record that he cannot establish that he was unaware of E.E.O. procedural requirements; he had been trained and certified in E.E.O. counseling, and his duties as Assistant Branch Chief included actively supporting E.E.O. provisions.

Plaintiff contends that his complaint was timely because its was brought within thirty days of learning of the June, 1990 memorandum regarding the desk audit grading his position at GS-12 and the decision to grade his replacement at GM-14. However, it is undisputed that these factors were not known to Plaintiff at the time he decided to resign, and thus did not influence Plaintiff's decision to resign or make him feel forced to resign. They are, therefore, irrelevant to his constructive discharge claim.

Plaintiff further contends that he was not obliged to complain separately about his constructive discharge. He cites no authority for this proposition. His contention fails, as a matter of law. The Ninth Circuit has held that a court is barred from considering new claims which were not the subject of an EEOC charge, unless the new claims are sufficiently "like or reasonably related to" the allegations contained in the administrative charge that the administrative investigation should have encompassed the additional facts alleged. Green v. Los Angeles County Superintendent of Schools, 883 F.2d 1472, 1475-76 (9th Cir. 1989).

There is no indication that the administrative investigation should have encompassed the alleged constructive discharge, inasmuch as Plaintiff did not decide to resign until two years after he filed the complaint, and nearly one year after the investigation of his charge. Further, the Ninth Circuit has held that a constructive discharge claim is not "like or reasonably related to" a discriminatory nonpromotion claim. Albano v. Schering-Plough, 912 F.2d 384, 386 (9th Cir.) cert. denied, 418 U.S. 1085 (1990); Ong v. Cleland, 642 F.2d 316, 320 (9th Cir. 1981).

Therefore, Defendant's motion for summary judgment must be granted on the ground that Plaintiff's constructive discharge claim is procedurally barred, as a matter of law.

IV. CONCLUSION

For the reasons stated above, Plaintiff's motion for summary judgment is denied, and Defendant's motion for summary judgment is granted on the grounds that Plaintiff failed to exhaust his administrative remedies on his constructive discharge claim.

Judgment shall be entered for Defendant, each side to bear its own costs. The clerk shall close the file.

Dated: Oct. 19, 1995.

(s) Claudia Wilken
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HERBERTS MILLS
Plaintiff,
v.
BRUCE BABBITT,
Secretary, Department
of the Interior.
_____)

No. C 93-04387 CW
JUDGMENT
Filed October 19, 1995

This action came on for hearing before the Court, the Honorable Claudia Wilkin, United States District Judge, presiding, and the issues having been duly heard and the Court having duly rendered its decision,

IT IS HEREBY ORDERED AND ADJUDGED:

That Plaintiff Herbert Mills takes nothing, that the action be dismissed on the merits, and that each side bear its own costs of action.

Dated: Oct. 19, 1995.

(s) Claudia Wilken
United States District Judge

Entered Oct. 23, 1995.